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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

1 RECORD OF ORAL HEARING
2 UNITED STATES PATENT AND TRADEMARK OFFICE
3

4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
6

7 *Ex Parte* YOUNGER AHLUWALIA, MATTI KIIK,
8 and THOMAS D. KAROL
9

10 Appeal 2010-003182
11 Application 10/766,652
12 Technology Center 1700
13

14 Oral Hearing Held: January 12, 2011
15

16 Before CHARLES F. WARREN, JEFFREY T. SMITH, and KAREN M.
17 HASTINGS, *Administrative Patent Judges*.

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANT:

20 JOHN D. MURNANE, ESQUIRE
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23 The above-entitled matter came on for hearing on Wednesday,
24 January 12, 2011, commencing at 9:48 a.m., at the U.S. Patent and
25 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before
26 Timothy J. Atkinson, Jr., a Notary Public.

PROCEEDINGS

THE USHER: Calendar No. 24, Appeal No. 2010-003182.

Mr. Murnane.

JUDGE WARREN: Good morning, Mr. Murnane.

MR. MURNANE: Good morning, Your Honors.

JUDGE WARREN: Would you please introduce your co-counsel?

MR. MURNANE: Yes. Your Honors, this is Alicia Russo who is a partner at Fitzpatrick, Cella, Harper & Scinto, the firm where I am also a partner.

JUDGE WARREN: If you could provide Mr. Atkinson, our reporter, with personal identification before or after your presentation, we'd appreciate it. There are two related appeals this morning. You may pick whichever one you wish to argue first.

MR. MURNANE: If I may, Your Honor, I'd like to argue the appeal for Serial Number 10/766,652.

JUDGE WARREN: That is Appeal Number 2010-003182. Okay.

MR. MURNANE: Thank you, Your Honor. I'll approach and give my identification to the court reporter.

JUDGE WARREN: Certainly.

MR. MURNANE: Thank you, sir.

JUDGE WARREN: As you know, sir, you have 20 minutes. You may proceed when ready.

MR. MURNANE: Thank you very much, Your Honor. May it please the Board, first I'd like to discuss the claimed invention for this case, the heat insulating and fire-resistant composite material which comprises a substrate having an ionic charge and a coating which coats the substrate

1 having essentially the same ionic charge. A metallic component is adhered
2 to the coated substrate and the coating consists essentially of a filler material
3 which comprises clay and a binder material, and the binder material bonds
4 the filler material together and to the substrate wherein the coating does not
5 bleed through the substrate.

6 JUDGE WARREN: Counselor, would you define for us the meaning
7 of the phrase “not bleed through the substrate” in light of your specification?

8 MR. MURNANE: Yes, Your Honor. The substrate is described in
9 the specification as having different possibilities and, as is noted in the
10 specification, substrates typically, when they are coated, have coatings in the
11 prior art bleed through the substrate, and as was noted in Ahluwalia ‘257,
12 which is prior art to this particular case, it is often the case that substrates
13 have coatings bleed through into the interstices. In this particular instance,
14 because the coating has an ionic charge which is the same as the ionic
15 charge of the substrate, there is no bleed through. The coating does not go
16 through.

17 JUDGE WARREN: Would you show us where in your specification
18 that the material does not at least go into -- the coating does not at least go
19 into the interstices between the yarns and filaments of your woven substrate?

20 MR. MURNANE: Your Honor, the specification describes the
21 substrate and the coatings and it points out that the coating does not bleed
22 through the substrate.

23 JUDGE WARREN: Generally, bleeding through means it does not
24 appear on the other side of the substrate when coated on one side, so if it
25 merely fills the interstices, would not that be what one would expect if you
26

1 put a coating that comprised a filler and a binder on top of say a fiberglass
2 substrate?

3 MR. MURNANE: I don't think so, Your Honor. According to --

4 JUDGE WARREN: So, it doesn't go below the level, the upper level
5 of the fibers of the substrate? It just stays right on top? It does not sink in at
6 all into the substrate?

7 MR. MURNANE: By bleeding through, Your Honor, I believe the
8 specification is clear that this coating does not go through the substrate.

9 JUDGE WARREN: Through the entire structure? So, it could have
10 filled in interstices of a substrate between the fibers of the substrate, but not
11 go all the way through the substrate?

12 MR. MURNANE: There could be possibly some penetration, but it
13 wouldn't go all the way through.

14 JUDGE WARREN: All the way through.

15 MR. MURNANE: Yes. Thank you, Your Honor.

16 JUDGE WARREN: Thank you.

17 MR. MURNANE: The Examiner, on page 4 of the Answer, says that
18 the Ahluwalia '257 prior art patent discloses the claimed invention except
19 for the teaching that a metallic component is adhered to the coated substrate
20 on one or both sides and the specific teaching that clay is added to the
21 coating. The Examiner concludes on that page that it would have been
22 obvious to one of ordinary skill in the art to have added the Langer prior art
23 aluminum sheet to one or both sides of the coated substrate of Ahluwalia
24 motivated by the desire to create a structural article with increased strength
25 and durability.

26

1 Your Honor, we submit that there would be no such motivation
2 because metal was not added to the other prior art references even though, as
3 I will go through now, Langer had been around for a while. Langer is a
4 September 15, 1986 patent. Langer discloses a sheet material for fryer
5 protection. It discloses a Fiberglas sheet material with a binder of acrylic
6 resin and endothermic -- excuse me, an endothermic filler of alumina
7 trihydrate. Clay is not listed among the fillers. It's mentioned as an
8 inorganic binder on which Langer does not rely. The backing sheet, the
9 aluminum backing sheet of Langer is not noted there to provide any heat
10 resistance or any fire resistance, but to give added strength to the material.
11 So, Langer 1986, we've got metal, we don't have clay.

12 The Great Britain reference on which the Examiner relies, the GB
13 '060, another 1986 reference, is a fire-resistant material, a synthetic material.
14 There are fibers which include glass wool. There's clay and there's a binder.
15 The combined components are suspended in a fluid. They're separated on a
16 screen to leave a mat which is pressed into the -- pressed to create the final
17 product. There's no mention there of any metal and there's no teaching
18 there of not bleeding through any substrate. The Dugan --

19 JUDGE WARREN: Does it teach bleeding through? It wouldn't,
20 would it, if it's all essentially a slurry that's processed?

21 MR. MURNANE: Your honor, I would submit that it's suggested
22 that it certainly can be going through. I think the suggestion is --

23 JUDGE WARREN: This is Weaver, the British one, the British
24 reference?

25 MR. MURNANE: Yeah, the Great Britain '060, Your Honor.

26

1 JUDGE WARREN: And you say that is processed as it says on
2 page --

3 MR. MURNANE: Page --

4 JUDGE WARREN: Essentially all the ingredients are mixed together
5 and then they are separated on a screen --

6 MR. MURNANE: Right.

7 JUDGE WARREN: -- and that is put on a screen --

8 MR. MURNANE: To leave a mat or solids. And that's on page 3,
9 lines 6 to 11, Your Honor.

10 JUDGE WARREN: And I'm not sure -- would you please explain
11 why that would be relevant to whether adding a clay to the primary reference
12 would indicate to one in the art that the material with the clay would bleed
13 through or would not bleed through?

14 MR. MURNANE: There is no indication here in this particular
15 reference that including clay will or will not bleed through.

16 JUDGE WARREN: But it does teach that clay can be used in a fire-
17 retardant material?

18 MR. MURNANE: Yes, it does, Your Honor.

19 JUDGE WARREN: Thank you.

20 MR. MURNANE: No mention of metal. Dugan is a 1991 patent. We
21 have a flame barrier fabric which is attached to a fabric substrate, a silicon
22 polymer coating, a reflective flame durable paint, and the silicone polymer
23 coating may include flame-retardant fillers such as clay. It is said that the
24 silicone layer fills the voids between the yarns. Again, there is no mention
25 here of any metal being used. Even though this is 1991 and Langer was
26

1 1986, there's no mention here of any metal being used in association with
2 Dugan to create this flame barrier fabric.

3 Dombeck is a May 2001 patent, a high temperature resistant glass
4 fiber composition, glass fibers coated with a halogenated resin latex, calcium
5 carbonate material and a cationic flocculent. The latex binder is anionically
6 stabilized. The cationic flocculent is added to act as a coupling agent for the
7 latex binder and calcium carbonate to the glass fibers. The aqueous
8 dispersion is drained to form a mat. Other fillers may be included, such as
9 clay. The coating has the opposite charge as the glass fibers. Again,
10 Dombeck 2001, we have a temperature-resistant material. No metal.

11 Now, Your Honor, going back to the Examiner's position here, the
12 Examiner says it would have been obvious to one having ordinary skill in
13 the art -- this is on page 5 of the Answer -- to have added the clay filler
14 taught by the British '060 or Dugan or Dombeck to the substrate of
15 Ahluwalia and Langer, motivated by the desire to create a substrate that has
16 increased --

17 JUDGE WARREN: And Langer, or just Ahluwalia?

18 MR. MURNANE: Well, it has to be Ahluwalia and Langer because
19 there's no metal in Ahluwalia and they say -- the Examiner says here, on
20 page 5. It's right above the heading which reads 10 Response to Argument.
21 To the substrate of Ahluwalia and Langer -- I'm reading: "to the substrate of
22 Ahluwalia and Langer, motivated by the desire to create a substrate that has
23 increased flame resistance."

24 JUDGE WARREN: Counselor, you stated at page 15 of the Brief that
25 the Applicants respectfully submit that whether it would have been obvious
26 to add Langer's aluminum sheet to the coated substrate of Ahluwalia is

1 irrelevant to the issue of patentability. If we just focus for a minute on the
2 clay in view of that, what is there in the references which would have
3 suggested to one of ordinary skill in the art that clay would not be added to
4 Ahluwalia because it would disturb the ionic balance that the reference
5 teaches between the substrate and the coating?

6 MR. MURNANE: Thank you, Your Honor. That's a very good
7 question. Looking at the Ahluwalia -- forgive me. I have a little bit of a
8 cold. Looking at the Ahluwalia '257 prior art patent, which focused in the
9 specification on the Blanpied patent, Ahluwalia noted there that he had a
10 different invention, that Blanpied had included clay, that clay had
11 traditionally been included in coated materials, and in those coated materials
12 the clay filler filled the interstices. He said he had something different. By
13 having a coating having essentially the same ionic charge as the substrate, he
14 had a coating which did not bleed through without the need for blowing and
15 other types of more cumbersome, expensive and time-consuming
16 procedures. So, we have there in Blanpied, which is noted in the
17 specification of Ahluwalia '257, that when you have clay, you have a
18 situation where interstices are filled, and he distinguished that.

19 JUDGE WARREN: Counselor, would you point out exactly in
20 column 1 of the prior reference where clay is singled out as being responsible
21 for the coating to bleed into the -- in between --

22 MR. MURNANE: I don't think it's single

23 JUDGE WARREN: -- the interstices?

24 MR. MURNANE: Forgive me for interrupting, Your Honor. I'm
25 sorry.

26 JUDGE WARREN: Pardon?

1 MR. MURNANE: Forgive me for interrupting. I'm sorry.

2 JUDGE WARREN: That's fine.

3 MR. MURNANE: Okay. I wouldn't say it's singled out as causing
4 the problem, Your Honor. It's noted amongst the fillers that are used, and
5 those fillers, it's noted, did bleed through. Clay is noted in line 22, I believe,
6 of column 1 of the primary reference, and Ahluwalia distinguished that.
7 Then we had -- after Ahluwalia '257, we have the nonprior art improvement
8 patent, Ahluwalia '550, which is a case examined by the same Examiner
9 here. The difference between the improvement patent, Ahluwalia '550,
10 which is not prior art to the patent applications in suit here -- at issue here.
11 There, we have a coating, which is the same type of coating as Ahluwalia
12 '257, but there clay has been added, and clay there was noted to enhance
13 drapability. Okay? So, there's nothing that I'm aware of in the prior art,
14 Your Honor, which would indicate that if you use clay with Ahluwalia
15 you're going to enhance heat resistance and flame retardance.

16 JUDGE WARREN: But isn't clay identified by the references as
17 being an endothermic filler?

18 MR. MURNANE: Yes, it is, Your Honor. That is correct. And here
19 we have the unique situation where clay is used in a coating which does not
20 bleed through. We haven't seen that in the past.

21 JUDGE WARREN: Well, filling in interstices is -- would you say
22 that's bleed through or is it borderline bleed through? Or isn't it bleed
23 through at all? It just fills the voids?

24 MR. MURNANE: Well, Your Honor, at some point -- it's a very
25 interesting question. As I said in response to Your Honor's earlier question,
26

1 my understanding of the term bleed through is it bleeds through. It doesn't
2 just occupy a portion of the interstices.

3 JUDGE WARREN: Okay.

4 MR. MURNANE: Okay. Now, so, the point I was addressing, Your
5 Honor, the Examiner says it would have been obvious to have added the clay
6 of Great Britain '060 or Dugan or Dombeck to the substrate of Ahluwalia
7 and Langer. That's what the Examiner says. Motivated by the desire to
8 create a substrate that has increased flame resistance. And, again, Your
9 Honor, we don't see how it would have been obvious. It had never been
10 done before. If it had been obvious, you would have thought -- you would
11 have seen some metal in some of these other cases, but only Langer had it
12 and Langer says "I don't use clay." The Examiner also says that the fact
13 that -- and kind of addressing the point, Your Honor was talking about, the
14 fact that clay is used, and we made that point in our papers, is unpersuasive
15 because Ahluwalia '257 mentions that clay had been used. But, as I just
16 pointed out to Your Honor -- and this is, again, on 5 of the Answer. I'd like
17 to point out to Your Honor, that was distinguished in Ahluwalia. Yeah,
18 Ahluwalia said clay was used, but not in a no bleed through product. And,
19 as we've pointed out in our Brief, we have had three subsequent -- the
20 Assignee's patents, which talk about this type of coating, none of which
21 have ever noted that clay has been used in a no bleed through product.

22 JUDGE WARREN: So, you're saying that the absence of the
23 disclosure in the primary reference of clay as a preferred filler would be
24 enough to tell one of ordinary skill in the art that the clay would not be
25 useful in the reference as a filler?

26

1 MR. MURNANE: It would be an indication. If one reads the primary
2 reference, there's an indication there since he notes, he notes clay earlier on
3 when talking about Blanpied and he's not using clay. He's said he's
4 specifying a consisting of group of possible components for his filler and he
5 doesn't have clay in there. That's indicating clay's not going to do it, I
6 think, Your Honor, because he contrasted there. So, as I said -- forgive me,
7 Your Honor, with this cold -- we have here the unique situation, and it's
8 noted in our Brief on pages 12 to 13, where he had Ahluwalia, the primary
9 reference, no clay, no metal. Then you have the improvement, no prior art
10 to Ahluwalia '550, clay is added to enhance drapability because now it's
11 noted that for fabrics this can be an important product. But without clay,
12 you don't have the drapability that you need for fabrics. Fabrics are
13 important. That's noted in the spec.

14 There are many uses for these products. Some of them could be
15 mattresses. Some of them could be curtains. Some of them could be
16 upholstery. And then, you have this invention where you have the
17 unexpected result that adding a metallic component has significantly
18 changed the animal that we have here, Your Honors. Here, and it's -- the
19 data is in the specification -- when you added the metal and you have the
20 burn test, and I'll get to this in a little bit more detail in a moment, you had a
21 very, very different result *vis a vis* the other two.

22 The Examiner also says on page 6 of the Answer that we can't show
23 nonobviousness by attacking the references individually. We're really not
24 planning to do that, Your Honor. Don't think we have. We're just saying if
25 there had been a suggestion to make the combination, going back to 1986,

26

1 we don't understand why none of the patents that were prior art would have
2 included --

3 JUDGE WARREN: We understand it.

4 MR. MURNANE: Thank you very much, Your Honor. And, we
5 would say there, Your Honor, that it would really be only the use of
6 hindsight which would cause one to include the metal of Langer in a no-clay
7 material, with the nonmetal other prior art which includes some clay.

8 Now, getting to the results, Your Honor, the results that are in the
9 patent specification, the Examiner says on page 7 of the Answer that the
10 cotton ball test results only refer to the system described in the application,
11 not to individual claims. As such, the Declaration does not show that the
12 objective evidence of nonobviousness is commensurate in scope with the
13 claims. The claims do not set forth any specific properties resulting from the
14 cotton ball test. We, therefore, Your Honor, just confess a little confusion.
15 The claims specify we have a heat-insulating and fire-resistant product. As
16 far as the nexus is concerned, if we look at --

17 JUDGE WARREN: Counselor?

18 MR. MURNANE: I'm sorry. Yes, Your Honor.

19 JUDGE WARREN: Would you walk us through the evidence in the
20 spec, please?

21 MR. MURNANE: Yes, I will, Your Honor. Thank you very much.
22 I'd invite attention to paragraph 49 on page 17 of the specification. Are we
23 all there, Your Honor? May I proceed? Thank you, Your Honor. So, we
24 say there at the bottom of page 17, paragraph 49, when the substrate is
25 coated on only one side with the coating, and when the metallic component
26 is adhered directly to the substrate on the uncoated side, an adhesive is

employed to achieve adherence. The heat-insulating and fire-resistant composite material was checked for combustibility. A cotton ball test was performed to determine whether, when exposed to the flame of a Bunsen Burner, a cotton ball placed on top of the composite materials of the invention and on the other side of the flame, would be protected from the flame.

JUDGE WARREN: Perhaps I could be more specific. If you would, please identify the three samples and what they constitute.

MR. MURNANE: Yes, Your Honor, I will. The three samples begin at the very next sentence there, Your Honor. We have the composite material lacking aluminum foil. That's number one. Then we have, what that is, that's --

JUDGE WARREN: Are we to presume that that has clay in that composition?

MR. MURNANE: That's correct, Your Honor.

JUDGE WARREN: Is that particular composite identified any place in the specification?

MR. MURNANE: I think, Your Honor, when we read the entirety of the specification it's clear because it talks about -- this case talks about how it's an improvement on the prior composite material and this prior composite material did not include alumina. It lacked the aluminum foil. The next one is the composite material of the present invention, which included aluminum foil. So, when you read the specification, you have first talking about Ahluwalia '257 with no clay. Then it mentions there is an improvement in order to achieve drapability, clay was added and we ended up with the '550 patent. That patent hadn't issued by the time this case was filed, but it's

1 identified by serial number. So, it's called the composite material without
2 the foil. And, next we have --

3 JUDGE WARREN: If we could just focus on the three in the spec,
4 three examples.

5 MR. MURNANE: Right. So, then the next one is Ahluwalia '257.
6 Those are the three.

7 JUDGE WARREN: So, the second example includes the foil, but it
8 has no clay?

9 MR. MURNANE: No, it's of the present invention.

10 JUDGE WARREN: Okay.

11 MR. MURNANE: That's of the present invention, Your Honor.
12 Okay? So, then, the results are noted --

13 JUDGE WARREN: The last one --

14 MR. MURNANE: I'm sorry?

15 JUDGE WARREN: The last one has no clay and no aluminum.

16 MR. MURNANE: Right. That's Ahluwalia '257. So, when we look
17 at paragraph 50, we see that the first one, Ahluwalia '550, and again it
18 hadn't been patented yet, but this is the first one, there the cotton ball
19 burned --

20 JUDGE WARREN: Counselor, you keep referring to that particular
21 patent. Are we to presume the first composite is of that patent?

22 MR. MURNANE: That's correct. That patent had not yet --

23 JUDGE WARREN: Where is that disclosed in the specification?

24 MR. MURNANE: The patent had not yet issued, Your Honor, but it's
25 noted earlier in the specification. I will find it.

26 JUDGE WARREN: So --

1 MR. MURNANE: On page 5, paragraph 14, that's the composite
2 material which has clay. That ended up issuing later as the '550 patent.

3 JUDGE WARREN: But that's a description of prior art and,
4 essentially, related applications for that particular section.

5 MR. MURNANE: But, no, Your Honor, the '550 is not

6 JUDGE WARREN: So, we don't have -- for example, with your
7 three comparisons if all the substrates are the same, if the ingredients which
8 are in common are the same --

9 MR. MURNANE: Everything is the same. When we go to the
10 bottom of page 17 to the top of page 18, everything is the same except as
11 follows. If we start with the last one, Ahluwalia '257, number 3, that is a
12 coated substrate as defined in Ahluwalia '257. The first one, number 1
13 there, is Ahluwalia '257, which also includes clay, but no foil.

14 JUDGE WARREN: So, would it also have some of the filler of
15 Ahluwalia in it, or would it just have the clay in it?

16 MR. MURNANE: You also have some of the filler of Ahluwalia. It
17 includes clay.

18 JUDGE WARREN: It includes clay in the filler.

19 MR. MURNANE: Right.

20 JUDGE WARREN: So, we have no idea what the content of the clay
21 is in that particular form?

22 MR. MURNANE: The quantitative amount of clay, no we don't,
23 Your Honor.

24 JUDGE WARREN: Okay.

25 MR. MURNANE: No, we don't. We don't. These are products of
26 the company. Number 3 is the Versashield product of the Ahluwalia '257

1 patent. Product number 1 is now the product of the Ahluwalia '550 patent,
2 and now number 2 is this invention, which has clay in the filler and metal.

3 JUDGE WARREN: Does it also have additional filler in it, or just
4 clay?

5 MR. MURNANE: Oh, it has -- it also has -- it can have additional
6 fillers. This --

7 JUDGE WARREN: But we don't know that.

8 MR. MURNANE: Your Honor, I can submit this is an apples to
9 apples to apples comparison in terms of what was put together here. That's
10 my understanding. A faithful effort was made to provide examples for a
11 burn test which would be differing only, it's my understanding, Your Honor,
12 it's my understanding -- which would be differing only in that number 3,
13 which is Ahluwalia '257, doesn't include clay in the filler and doesn't have
14 metal. Number 1, which is now the Ahluwalia '550, it is not prior art,
15 doesn't include metal but includes clay in the filler. And number 2 is the
16 instant invention, which includes clay in the filler and metal.

17 JUDGE WARREN: Okay.

18 MR. MURNANE: That's my understanding.

19 JUDGE WARREN: We can go from there. We understand the
20 results. They were set forth in paragraph 50.

21 MR. MURNANE: Thank you very much, Your Honor. So, again, we
22 submit those results are unexpected results, Your Honor.

23 If I may, Your Honor, I'd like to talk about for just a moment the
24 standard here that we believe should be considered when looking at this
25 invention. And, we noted in our Brief on page 19 the Office's examination
26 guidelines for determining obviousness, which were effective October 10,

2007, which were published that fall. We note there that the Office said that Office personnel, referring to the Examiners, must explain why the differences between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art. Your Honor, we really don't, we don't think we have from the Examiner in the Answer that explanation. We don't think that combining Langer with that art would yield predictable results. There's no indication of any predictability there. We don't see that one of ordinary skill in the art would have recognized the results of the combination, would have found them to be predictable. Just noting that prior art elements can be combined to render an invention obvious is not enough. We say there has to be more. The Office noted in its guidelines and footnote 48, the *U.S. v. Adams* case. Each of the elements in the Adam's battery case were well known in the art, but to combine them as Adams did, required that a person reasonably skilled in the art ignore the teaching away. Here, we have Langer, which says I don't use clay. I know clay is there, but I don't use clay. And he's got metal and the others, they're not using metal at all. We just don't see how there was a motivation to combine this, Your Honor. Looking at something that's later, later Federal Circuit Authority, the *Sud-Chemie v. Multisorb Tech* case, which we talk about on page 2 of our Reply Brief. There, the Federal Circuit noted in 2009 that the Komatsu reference taught compatible polymeric materials, but there the Federal Circuit noted that the District Court failed to acknowledge that the specified classes of materials comprised a large number of substances with different properties. Something that there was some incompatibility there. We noted earlier that with respect to Dombeck, there was a note there that we have different charges. We have anionic and cationic charges. That's different

1 from what we're talking about here. So, we think when we look at the
2 entirety of the references, Your Honor, we look at everything, we don't have
3 the suggestion to combine this prior art. I don't have any further comments
4 on this particular case, Your Honors. I'd be happy to entertain questions.
5 And, I have much fewer comments on the second one.

6 JUDGE WARREN: That's fine. We have no further questions from
7 the Bench. Thank you for coming. The hearing is adjourned. If you all
8 would give us a couple of minutes to get ready for the next case, we'd
9 appreciate it.

10 (Whereupon, the proceedings, at 10:18 a.m., were concluded.)

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